

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**ROBERT C. WEIBEL**  
Claimant

VS.

**MIDWEST DOORS DIVERSIFIED**  
Respondent

AND

**THE WESTERN GUARANTY FUND c/o  
CAMBRIDGE INTEGRATED SERVICES,  
INC.**  
Insurance Carrier

Docket No. 265,138

**ORDER**

Respondent requested review of the July 21, 2003 Award of Administrative Law Judge (ALJ) Brad E. Avery. The Appeals Board (Board) placed this matter on a summary docket as of October 7, 2003.

**APPEARANCES**

Chris Miller of Lawrence, Kansas, appeared for the claimant. Crystal Nesheim of Wichita, Kansas, appeared for respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award.

**ISSUES**

Respondent contends the ALJ improperly calculated the claimant's average weekly

wage when he included wages earned after the stipulated date of accident. As a result, respondent argues that claimant's average weekly wage was artificially high and should be recalculated in the method set forth in K.S.A. 44-511(b)(5).

Claimant's response is two-fold. First, claimant contends that his average weekly wage should be higher, based upon not only an average number of hours that he worked during the day but also based upon the number of days "which the wage statement indicates that Mr. Weibel was scheduled to work."<sup>1</sup> This method of calculation would yield a much higher wage rate than that found by the ALJ.

In the alternative, claimant argues that the ALJ's calculations were proper and should be affirmed.

Although not listed as an issue in the Application for Appeal, the parties also addressed the nature and extent of claimant's impairment. Claimant maintains the evidence supports a 19 percent permanent impairment to the shoulder, rather than the 14.5 percent awarded by the ALJ.

Respondent requests the Board affirm the ALJ's finding with regard to permanency.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs, the Board finds the ALJ's Award should be affirmed in part and modified in part.

The parties presented the testimony of two doctors who spoke to the issue of claimant's impairment following his compensable injury on November 21, 2000. Dr. Chris Fevurly assigned a ten percent rating to the shoulder while Dr. Peter Bieri, the court-ordered independent medical examiner, assigned a 19 percent to the shoulder. The ALJ found both opinions to be credible and gave "equal deference to each rating."<sup>2</sup> As such, he found claimant's functional impairment to be 14.5 percent. The Board finds no reason to disturb the ALJ's finding in this respect nor has claimant provided any justifiable reason to do so. The 14.5 percent permanent partial impairment to the shoulder is affirmed.

The remaining issue for appeal is the claimant's average weekly wage. Claimant was hired by respondent "to drive a truck as it were to Omaha to get doors, overhead garage doors and pieces, and deliver them on the way back to various suppliers."<sup>3</sup> Claimant testified that he "generally" did this on Tuesdays, Wednesdays and Thursdays.<sup>4</sup>

---

<sup>1</sup> Submission Brief Before the Workers' Compensation Board at 6 (filed Sept. 22, 2003).

<sup>2</sup> Award at 2.

<sup>3</sup> R.H. Trans. at 9.

<sup>4</sup> *Id.* at 9.

His rate of pay was \$10 per hour. However, the wage statement produced by respondent and entered into evidence without objection does not confirm claimant's recollection.

The wage statement reflects the following days and hours worked:

Date:	Number of hours:	Wage Rate:	Total Wages:
Oct. 31, 2000	15.5	\$10.00	\$155.00
Nov. 1, 2000	14.5	\$10.00	\$145.00
Nov. 2, 2000	13	\$10.00	\$130.00
Nov. 6, 2000	12	\$10.00	\$120.00
Nov. 21, 2000	15.5	\$10.00	\$155.00
Dec. 27, 2000	14	\$10.00	\$140.00
Dec. 28, 2000	17	\$10.00	\$170.00
Total			\$1,015.00

This wage statement shows that, at least according to respondent's records, claimant worked three days the first week (October 31, November 1 and 2, 2000) but only one day a week over the next two weeks. He was then injured on November 21, 2000.

Claimant testified that he worked "every week" as scheduled and that he was at a loss to explain why the records were incomplete. He maintains that he would routinely work on Tuesday and then worked delivering the goods on Wednesday and into Thursday, if need be. According to claimant, he did this regularly until November 21, 2000, the date he was injured. When asked if he could tell the ALJ what days he worked during the period that were not reflected in the wage statement, claimant responded that "[t]o go on record I think I'll have to do some research on it" . . . and that he didn't really specifically remember.<sup>5</sup> Other than claimant's own allegation, there is no additional evidence to substantiate his contention that he regularly worked three days a week up until November 21, 2000, his date of accident. Moreover, claimant's own tax records show that he reported and paid taxes on the gross amount of wages reflected in the wage statement offered by respondent.

The method of calculating average weekly wage for a part time, hourly employee is governed by K.S.A. 44-511(b)(5). That statute states as follows:

If at the time of the accident the money rate is fixed by the output of the employee, on a commission or percentage basis, on a flat-rate basis rate is not fixed by the week, month, year or hour, and if the employee has been

---

<sup>5</sup> R. H. Trans. at 17.

employed by the employer at least one calendar week immediately preceding the date of accident, the average gross weekly wage shall be the gross amount of money earned during the number of calendar weeks so employed, up to a maximum of 26 calendar weeks immediately preceding the date of the accident, divided by the number of weeks employed, or by 26 as the case may be, plus the average weekly value of any additional compensation and the value of the employee's average weekly overtime computed as provided in paragraph (4) of this subsection. If the employee had been in the employment of the employer less than one calendar week immediately preceding the accident, the average gross weekly wage shall be determined by the administrative law judge based upon all of the evidence and circumstances, including the usual wage for similar services paid by the same employer, or if the employer has no employees performing similar services, the usual wage paid for similar services by other employers. The average gross weekly wage so determined shall not exceed the actual average gross weekly wage the employee was reasonably expected to earn in the employee's specific employment, including the average weekly value of any additional compensation and the value of the employee's average weekly overtime computed as provided in paragraph (4) of this subsection. In making any computations under this paragraph (5), workweeks during which the employee was on vacation, leave of absence, sick leave or was absent the entire workweek because of illness or injury shall not be considered.

The ALJ calculated the average weekly wage based upon the gross amount of wages claimant received during the entire period reflected on the wage statement. This figure was \$1,015 and he then divided that by three weeks, yielding an average weekly wage of \$338.33.

Respondent argues the ALJ should not have included the gross wage figure. Rather, only those wages earned up to the date of injury should have been used. The Board finds respondent's complaint has merit but that its suggested method of computation is inconsistent with the language employed in the statute. The ALJ erroneously included two days of wages that were earned after the injury occurred in calculating the wage. K.S.A. 44-511 contemplates a wage calculation using wages earned in the weeks before the date of injury, not after and does not include the date of accident. Thus, the total wages that should have been utilized is \$550. When that figure is divided by the two weeks he worked prior to the accident as prescribed by subsection (5), yields the figure of \$275 for an average weekly wage.

Accordingly, the ALJ's determination of average weekly is modified to reflect an average weekly wage of \$275 per week, which yields a compensation rate of \$183.34 per week.

Claimant's argument that the average weekly should have actually been as much as \$423 is unfounded. Claimant suggests the claimant's average weekly wage should be

based upon an average working day of 14.1 hours which yields a daily rate of \$141. At this daily rate, working three days a week, claimant argues that his average weekly wage was \$423. There is no statutory basis for this method of calculation and therefore, the Board rejects this suggestion.

The balance of the Award is affirmed, to the extent that it is not inconsistent with the findings herein.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated July 21, 2003, is modified as follows:

The claimant is entitled to 102.92 weeks of temporary total disability compensation at the rate of \$183.34 or \$18,869.35 followed by 17.70 weeks of permanent partial disability at the \$183.34 or \$3,245.12 for a 14.5 permanent impairment to the shoulder making a total award of \$22,114.47, all of which is currently due and is ordered paid in one lump sum less amounts previously paid.

### **IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of October 2003.

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

c: Chris Miller, Attorney for Claimant  
Crystal Nesheim, Attorney for Respondent and its Insurance Carrier  
Brad E. Avery, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director